APPEAL NO. 93072

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held at the request of appellant (claimant) on October 10, 1992, in (city), Texas, with (hearing officer) presiding, to determine whether claimant had reached maximum medical improvement (MMI) and, if so, his correct whole body impairment rating. The hearing officer determined that the presumptive weight of the designated doctor's report that claimant reached MMI on April 9, 1992, with a 7% impairment rating was rebutted, and concluded that claimant reached MMI on May 29, 1992, with an 8% impairment rating, which he found to be the MMI date and impairment rating certified by respondent's (carrier) doctor. Claimant's request for review challenges the hearing officer's determination and urges the Appeals Panel to adopt the 26% impairment rating assigned by his treating doctor. Carrier asks us to refuse to consider claimant's request for review asserting it was not timely filed. Carrier further urges our affirmance if the appeal is considered.

DECISION

Finding error, we reverse and remand.

The hearing officer's decision was distributed on December 4, 1992 to the parties. Since claimant did not state the date he received the decision, he is deemed to have received it five days later, that is, on December 9, 1992. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)). Claimant was required to file his request for review not later than the 15th day after receiving the decision, that is, on December 24, 1992. Article 8306-6.41(a) (1989 Act). Claimant's request for review was mailed on December 15, 1992, to the Texas Workers' Compensation Commission (Commission) in Austin, Texas, and was received on December 21, 1992. Accordingly, claimant's appeal was timely filed. Rule 143.3. However, claimant's request for review was not forwarded to the Commission's Appeals Panel but instead was apparently forwarded to the Commission's (city), Texas, field office. Claimant mailed a second request for review to the Commission in (city 2), Texas, on January 25, 1993. This second request was, in substance, a replication of the first appeal, but was, of course, untimely. Neither of claimant's appeals contained a certificate of service (Rule 143.3(b)) and the carrier was not served until it received a copy of the second appeal from the Commission on January 28, 1993. The carrier then timely filed a response. Article 8308-6.41(a); Rule 143.4. Since claimant's first request for review was timely filed, carrier's assertion that the Appeals Panel should not consider claimant's request for review is without merit. *See* Texas Workers' Compensation Commission Appeal No. 92045, decided February 25, 1992, and Texas Workers' Compensation Commission Appeal No. 92671, decided February 3, 1993.

The compensability of claimant's injury on (date of injury) was not in dispute. Claimant, the sole witness, testified he was injured when he fell from a ladder carrying a 50 pound sack of white powder. He introduced a Specific and Subsequent Medical Report (TWCC-64) reflecting a November 21, 1991 visit to his treating doctor, .D. (Dr. P). This report stated that claimant's diagnosis was "lumbar strain" and "post traumatic lumbar spondylogenic (ruptured disc) discogenic pain syndrome," that his endurance exercise program and medications were continued, that his condition "remains stable," and that his anticipated MMI date was November 1993. Claimant's other TWCC-64, a report of his July 23, 1992 visit to Dr. P, omitted the "lumbar strain" diagnosis but included "spondylolisthesis Class I," and stated that claimant's condition was "stable," that his treatment plan and medications were continued, and that his anticipated MMI date was "unknown." Claimant's final exhibit was a Report of Medical Evaluation (TWCC-69) dated August 21, 1992, signed by Dr. P, which stated that claimant's condition "remains stable," and that he reached MMI on August 21, 1992, with a whole body impairment rating of 26%. Claimant testified he felt Dr. P's opinion as to his impairment rating was the correct one because Dr. P put him on different machines, whereas the designated doctor, (Dr. R), did not do so but merely had him walk back and forth during a ten minute examination. He said he has not had surgery, still has pain, and would be working but for the pain. Claimant did not contend he had not reached MMI. What he sought at the hearing (and seeks on appeal) was a determination that his correct impairment rating was 26% as stated on Dr. P's TWCC-69.

According to the carrier's exhibits, nerve conduction studies of claimant's lower extremities on February 5, 1992 were normal although claimant refused the needle exam. The report of an MRI of claimant's lumbar spine of the same date stated the conclusion as "spondylosis and spondylolisthesis Class I at L5-SD1 with minimal rightward neural effacement." Claimant was then age 50. Carrier requested a medical examination order from the Commission on March 5, 1992, for (Dr. W) to provide a second opinion as to the treatment and its duration that claimant required. A TWCC-69 signed by Dr. W noted the following: "[x]-rays reveal extensive degenerative changes in the lower back along with a bilateral lumbosacral spondylolysis and first degree spondylolisthesis. The MRI has shown also the degenerative changes and the spondylolisthesis." Dr. W said the diagnosis was "lumbar strain aggravating spondylolisthesis" and went on to state the following:

> At this point as far as the injury is concerned, I believe the patient has reached [MMI] with an 8 percent disability on the basis of his spondylolisthesis. The spondylolisthesis is developmental and not a result of his injury. At this point the only treatment that may be necessary is a surgical fusion if he continues to have enough pain. Otherwise, he does not need any additional treatment as it will not relieve the spondylolisthesis.

Dr. W stated on the TWCC-69 that claimant reached MMI on May 20, 1992, and assigned an 8% whole body impairment rating.

On June 9, 1992, the Commission selected Dr. R as the designated doctor to examine claimant and resolve whether MMI had been reached and, if so, to assign an impairment rating. Dr. R signed a TWCC-69 which stated that claimant reached MMI on April 9, 1992, and assigned a 7% impairment rating. In his narrative report, dated July 2, 1992 and attached to the TWCC-69, Dr. R reviewed claimant's history of his present illness, his systems, and stated the results of the physical examination of claimant. Dr. R noted claimant's fairly severe low left back pain with left leg pain but recommended against surgery "at this time," though he suspected claimant may come to surgery in the future. Dr. R stated that without consideration given to surgery, he agreed with Dr. P that claimant had reached MMI. Dr. R further stated that Dr. P had given claimant a 7% whole body impairment rating and that he agreed with that impairment level.

Carrier also introduced an undated letter from Dr. P asking carrier to disregard a "form No. 64" of "4/9/92" because it mistakenly stated a physical impairment rating. Dr. P's letter said an impairment rating could not be established since claimant had not reached MMI. The TWCC-64 reporting claimant's visit to Dr. P of April 9, 1992, said claimant's condition remained stable, that claimant should be allowed to participate in physical therapy and activation program to obtain pain relief, that Dr. P saw no need for surgery at that time, that "patient retains 7% physical impairment of the body as a whole," and that he anticipated claimant would reach MMI in June 1993.

In his discussion of the evidence, the hearing officer indicated he was concerned that the designated doctor adopted an impairment rating stated on an interim form (TWCC-64) and that he adopted the April 9, 1992 date as claimant's MMI date when that form stated that Dr. P anticipated MMI in June 1993. The hearing officer also stated that "[i]t "bothers [him] that the carrier's Required Medical Examination doctor, [Dr. W], gives a higher impairment rating than the designated doctor." The hearing officer also noted Dr. W's statement that the underlying cause of claimant's impairment was developmental and not due to his injury. In that regard, however, we have frequently observed that the aggravation of a preexisting condition may itself constitute a compensable injury.

The hearing officer's Finding of Fact No. 6 states that "[t]he great weight of the other evidence is contrary to the opinion of the designated doctor." Finding that the carrier's doctor certified that claimant reached MMI on May 20, 1992, and assigned claimant an 8% impairment rating, the hearing officer concluded that claimant reached MMI on May 20, 1992, with an 8% impairment rating.

Articles 8308-4.25(b) and 8308-4.26(g) provide that the designated doctor's report is to be accorded presumptive weight "unless the great weight of the other medical evidence is to the contrary. (Emphasis supplied.)" The hearing officer omitted the adjective "medical" in Finding of Fact No. 6, although it is included in the hearing officer's Decision and Order. Such omission raises a question to whether the hearing officer may have misapprehended the statutory test to be applied when rejecting a designated doctor's report concerning MMI and impairment rating. Claimant testified that Dr. R merely had him walk back and forth, used no machine, and spent only about ten minutes examining him. However, a claimant's lay testimony does not constitute medical evidence that can be considered in determining whether the "great weight" rebuts the "presumptive weight." Texas Workers' Compensation Commission Appeal No. 92614, decided June 5, 1992.

In Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, we emphasized the unique position a designated doctor's report occupies under the 1989 Act, discussed the "great weight of the other medical evidence" standard, and observed that "it is not just equally balancing evidence or a preponderance of evidence that can outweigh such a report, but only the 'great weight' of other medical evidence that can overcome it." We have also noted that no other doctor's report, including that of a treating doctor, is accorded this special presumptive status. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. The hearing officer's expressed concern that the carrier's doctor's rating was higher than that of the designated doctor (8% vs. 7%) is a further indication that the hearing officer may have misapprehended the standard for rebuttal of the presumptive weight to be accorded the designated doctor's report.

In Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992, we stated that a hearing officer who rejects a designated doctor's report because the great weight of the other medical evidence is to the contrary must clearly detail the evidence relevant to his or her consideration, clearly state why the great weight of the other medical evidence is to the contrary, and further state how the contrary evidence outweighs the designated doctor's report. *See also* Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992; Texas Workers Compensation Commission Appeal No. 92690, decided February 8, 1993; Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993; Texas Workers' Compensation Commission Appeal No. 93021, decided February 19, 1992; and Texas Workers' Compensation Commission Appeal No. 93039, decided March 1, 1993. The hearing officer's decision fails to detail and discuss the medical evidence sufficiently for us to clearly discern how the hearing officer arrived at his decision that the great weight of the other medical evidence was contrary to Dr. R's report.

The decision of the hearing officer is reversed and the case is remanded for the expedited development of additional evidence, as appropriate, and for such additional findings and consideration as are appropriate and not inconsistent with this opinion. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers'

Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge